No. 77-1781

In the Supreme Court of the United States

OCTOBER TERM, 1978

RABCO METAL PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals is reported at 566 F. 2d 1182. The memorandum opinion of the court of appeals (Pet. Ex. M) and the order correcting it and denying rehearing and rehearing *en banc* (Pet. Ex. O) are not reported. The decision and order of the National Labor Relations Board (Pet. Ex. H) are reported at 221 NLRB 1230.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1978. On May 9, 1978, Mr. Justice Rehnquist extended the time in which to file a petition for certiorari to and including June 16, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging five employees because of their union activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 140, 73 Stat. 525, 29 U.S.C. 158) are set forth at Pet. 2.

STATEMENT

1. The Board, adopting the decision of the Administrative Law Judge, found, *inter alia*, that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging five of its employees because of their union activity (Pet. Ex. H 16-17).[1] The facts on which the Board's findings are based as follows:

On October 19, 1974, Anthony Vince was hired by petitioner, and shortly thereafter, he began to talk with his fellow employees about joining Local 75 of the Sheet Metal Workers' International Association (the Union) (Pet. Ex. H 4). On November 13 or 14, 1974, without any

[1]The Board also concluded that petitioner violated Section 8(a) (1) of the Act "[b]y coercively interrogating employees about their activities, union and sympathies, by threatening employees with plant closure because they engaged in union activities, by threatening employees with layoff and termination because they engaged in union activities, by creating the impression of surveillance of employees' union activities and by soliciting employees to abandon support of, or to reject representation by the Union * * *" (Pet. Ex. H 26). These findings were upheld by the court of appeals (Pet. Ex. M 2-3), and petitioner does not contest them here. The court of appeals also enforced the Board's bargaining order issued against the Company in a subsequent proceeding (225 NLRB 236), which was consolidated with the instant case (Pet. Ex. M 1, 3-4). No issue concerning that order is raised here.

prior warning, petitioner's president and general manager, Bernard Raab, discharged Vince (*ibid.*). Raab told Vince that the reason for the discharge was that he (Raab) did not want anyone talking about a union in the shop, and that he would not permit a union in the shop (Pet. Ex. H 4-5; Tr. 16-18).[2]

In January of 1975, employee Fernandez Munoz began an effort to organize petitioner's employees (Pet. Ex. H 6). By February 14, a number of employees had signed union authorization cards, including Rafael Esquivel, Arturo Flores, George Garcia, and David Oldfield (*ibid.*; Tr. 31-32, 92, 104, 117). During this period, Raab confronted Munoz concerning his union activity, and told him that if the employees wanted a union, they should leave (Pet. Ex. H 6-7; Tr. 37). Raab also interrogated employees Oldfield, Dennis Chatman, Esquivel, Flores, and Garcia about union activities, including the signing of union authorization cards (Pet. Ex. H 8-10; Tr. 59-62, 75-76, 92-94, 105-107, 117-118).

On the morning of February 14, Raab received a letter from the Union stating that it had been designated as bargaining representative by a majority of petitioner's employees (Pet. Ex. H 14). That same day Rabb told Oldfield and Chatman that he understood they had signed Union cards, but each denied having done so. Raab then said, "I understand most of the guys have been signing union cards in the shop and I am going to let some guys go." (Pet. Ex. H 7; Tr. 60, 75-76.) Raab then prepared a statement of repudiation of the Union for

[2]"Tr." references are to the stenographic transcript of the unfair labor practice hearing, a copy of which has been lodged with the Clerk of this Court.

employee signatures, and had his secretary, Lulu Connors, distribute it to the employees (Tr. 160; Pet. Ex. H 14).[3] All the employees signed (*ibid.*).

On February 18, the Union filed a petition for a representation election with the Board. The next day, February 19, Raab discharged Flores, Esquivel, Garcia, and Oldfield (Pet. Ex. H 2, 16).

2. At the Board hearing, petitioner contended that Company President Raab did not tell Vince that he was being discharged for his union activity, and that he had been discharged for failure to do his work (Tr. 206). The Law Judge credited the contrary testimony of Vince (Pet. Ex. H 4-5). Concerning the other four discharges, petitioner contended that a decrease in business necessitated a layoff and that the four employees were selected for layoff for valid reasons unrelated to union activity (Tr. 208-221; Pet. Ex. H 16-22). The Law Judge rejected both contentions (Pet. Ex. 22-26).

The Law Judge explained (Pet. Ex. H 22-23; footnote omitted):

> [Petitioner] attempts to document its contention of valid economic reasons for the layoff by showing its monthly sales for the year preceding the hearing. The figures do show a decline in monthly sales from July 1974. However, the big drop in sales occurred in August and January. Yet [petitioner] effected no

[3]The statement read: (Pet. Ex. H 14):

> I, [name to be written in] do not wish to join Sheet Metal Workers Union, Local No. 75 or any other organized labor movement and am fully satisfied with the conditions and benefits given by RABCO METAL PRODUCTS, INC. This is my vountary and ultimate decision. Signed _____ Date _____

> layoffs in those months. Raab gave some vague testimony as to projections of future income but offered no supporting evidence except to the extent that support can be found in the fact that following an increase in February, monthly sales continued to decline. I find [petitioner's] evidence in this regard inconclusive in view of the undisputed testimony that in the past when work was slow, [petitioner] concentrated on producing stock equipment for inventory and the absence of anything in the record to indicate whether this decline in sales was different from previous years.
>
> The timing of the discharges is highly suspicious. Raab contends that he decided to lay off several employees because work started to decline in November and December 1974, but he did not effect the layoffs then because he did not want to lay off anyone just prior to Christmas or deprive anyone of vacation. [Petitioner's] figures as to its monthly sales does not support this contention. [Petitioner's] sales did not begin decreasing in November or December 1974. Its biggest drop in sales occurred in August 1974, yet [petitioner] hired two additional employees. Sales continued to drop in September and October 1974, and [petitioner] hired three additional employees in October. Its second largest decline in monthly sales was in January. Yet [petitioner] still did not effect the layoffs it was allegedly contemplating nor does it attempt to explain why the layoffs were not made then. Sales actually increased in February. The only apparent change from January to February was that [petitioner] became aware of its employees' union activities.

The Law Judge further concluded that petitioner's purported reasons for selecting the four employees for discharge were "unconvincing and pretextuous" (Pet. Ex. H 24). For example, although Raab contended that

Garcia had constantly made costly mistakes, Raab was able to point to only one specific instance, and his contention that Garcia was frequently absent was rebutted by Garcia's testimony that he had been reprimanded for absenteeism only once, two years before the discharge (Pet. Ex. H 24-25). Although petitioner contended Esquivel was an unsatisfactory employee, petitioner had given him two recent raises, one to encourage him to return to the Company (Pet. Ex. H 25). As to petitioner's contention that Oldfield was too expensive an employee to be continued as a helper—the only job for which he allegedly was competent—the Law Judge noted that he was only paid at the helpers' rate (*ibid.*). Finally, although petitioner contended that Flores was discharged because he was totally incompetent in the shop and precluded from driving because of insurance problems, Flores was told that he was being discharged only because of lack of work (*ibid.*).

3. The court of appeals upheld the Board's decision and enforced its order, finding that the record supported the Board's finding that the discharges were motivated by the employees' union activities (Pet. Ex. M 1-3). The court concluded that petitioner's explanation of the timing of the four February discharges was "unpersuasive" (Pet. Ex. M 3). And, in rejecting petitioner's motion for rehearing and suggestion for rehearing *en banc*, which was predicated on the ground that the instant case conflicted with other Ninth Circuit decisions concerning the question whether the lawfulness of a discharge animated by union animus is determined by applying a "partial motive" or "dominant motive test," the court added (Pet. Ex. O 2):

> It is unnecessary for us to decide whether differing formulations represent a substantive conflict, or whether they are simply linguistic differences because in the case before us there was ample justification in the record to sustain the Board's determination that anti-union animus was the moving force for the discharge.

ARGUMENT

Petitioner contends that the five employees were discharged because of legitimate business considerations, and that the Board erred in concluding that its true motive was anti-union animus. This contention raises only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

In any event, as shown above (*supra*, pp. 2-6), there is ample support in the record for the Board's findings. Petitioner challenges the Law Judge's credibility determinations, which were carefully explained (Pet. Ex. H 5, 11-13).[4] On this record the General Counsel's evidence does not " 'carr[y] its own death wound,' " nor does the Company's evidence " 'carr[y] its own irrefutable truth,' " and accordingly there is no basis for overturning the Law Judge's credibility resolutions. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659-660.

Petitioner further asserts (Pet. 20-41) that the instant case presents a conflict within the Ninth Circuit and between the various circuits as to the standard to be

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[4]Contrary to petitioner's argument (Pet. 17), the Law Judge did not assume that all employees "are 'good guys,' and all employers are not to be believed." The Law Judge merely noted that "otherwise honest" employees are often not candid with their employers about their union activities (Pet. Ex. H 5). Moreover, petitioner's complaint (Pet. 16) about the court of appeals' characterization of Company President Raab's testimony as "inherently suspect" ignores the fact that the court amended its opinion to strike that phrase in its order denying rehearing (Pet. Ex. O 1).

applied in discriminatory discharge cases where there is evidence that an employer had both proper and improper motives for the discharges. However, assuming *arguendo* a difference between the "partial motive" and "dominant motive" standards (see Pet. 28-37), there is no need to resolve that issue here, since the court of appeals found (*supra*, pp. 6-7) that the evidence establishes a violation even under the "dominant motive" test.[5]

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[5]Petitioner also contends (Pet. 19-20) that it was deprived of due process because the Administrative Law Judge was an employee of the National Labor Relations Board. At no time, however, did petitioner raise this due process claim before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), states that where an objection "has not been urged before the Board * * * [it] shall [not] be considered by the court." See also Board's Rules and Regulations, 29 C.F.R. 102.46(b); *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322. Therefore, since petitioner failed to present the issue to the Board, it is foreclosed from raising it in this forum.

In any event, there is no doubt that the division of prosecutorial and adjudicatory functions established by the 1947 Taft-Hartley amendments to the Act (see 29 U.S.C. 153-156), under which the independent General Counsel prosecutes and the Board (with the assistance of trial examiners now know as administrative law judges) decides cases, satisfies the requirements of due process. See 2 Davis, *Administrative Law Treatise* §§13.02, 13.04, 13.05 (1958). Indeed, the separation of functions present in the administration of the National Labor Relations Act is significantly greater than that required by the Administrative Procedure Act (5 U.S.C. 554(d)), or the Constitution. See Davis, *supra*, at §13.06; *Withrow* v. *Larkin*, 421 U.S. 35, 56-57; *Marcello* v. *Bonds*, 349 U.S. 302, 311.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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